

LETTER TO NPS ON POTENTIAL REVISIONS TO BULLETIN 38

From: CourtCoyle@aol.com

To: nr_info@nps.gov

Sent: 11/12/2012 1:56:21 P.M. Pacific Daylight Time

Subj: TCP/NAL Comment

Dear NPS:

These comments are submitted on behalf of my client, Camen Lucas, Kwaaymii Band of Laguna Indians (California) in response to the National Register Program Request for Comments on Identifying, Evaluating, and Documenting TCPs and Native American Landscapes.

They are informed by Ms. Lucas's twenty plus years of Native American Monitoring/Consulting/Education experience and my experience as a lawyer who helps tribes protect their sacred places, cultural landscapes, burial grounds and cultural practices. These comments are submitted at this time as my client was taking time off last week, as a twenty year veteran of the United States Marine Corps, in honor of Veteran's Day.

We have been working with Bulletin 38 almost since its inception and find it to be an extremely valuable tool. It should not be revised in any way that would diminish its current effectiveness.

However, it might be helpful if the NPS, in consultation with tribes, were to produce a best practice guidance supplement of some kind to fix the improper interpretations of Bulletin 38 that appear to exist regarding TCPs and tribal cultural resources and better institutionalize the practices that are consistent with it.

Regarding the seven questions NPS posed, we generally agree with the October 15, 2012, comments of Dr. Tom King, coauthor of Bulletin 38.

Below, are several "user identified" TCP-related issues we have experienced while participating in the CEQA, NEPA and NHPA Section 106 processes and during the eligibility/listing process for several tribally-significant properties now listed on or pending evaluation for the National Register for their tribal cultural values.

1. Reformat the National Register forms and clarify the property type categories so that TCPs can be more easily accommodated.
2. SHPOs and THPOs should have more specific and direct links to the NPS Bulletins that more clearly recognize TCPs and TCLs as historic properties under state and tribal preservation frameworks.
3. Surveys, studies and consultation must be completed prior to an agency making a decision on a project so that decision can be fully informed and must include consideration of the whole of the TCP - not just a particular part of the larger TCP that may be the physical location of a particular action.
4. Recommendations should include that federal agencies must include TCPs in their NHPA Section 110 surveys and that such work must be adequately and consistently funded to help get ahead of individual project conflicts with TCPs. There is a serious and chronic lack of Section 110 effort being made on federal public lands in southern California.
5. Programmatic avoidance, mitigation and compensation concepts should be explored by agencies and tribes to better address cumulative impacts under federal and state laws and policies. Right now severe impacts and effects are happening on the ground and it seems as though everyone is being offered benefits except local tribes and their cultural landscapes even though the impacts to those tribes and their cultural places is often irreversible.

6. Guidance should include how to better integrate the social effects of undertakings/projects/actions on traditional communities and tribes into federal and state impact assessments. The California Attorney General recently published a white paper on Environmental Justice that addresses some of these concerns in a state context: <http://oag.ca.gov/sites/all/files/pdfs/environment/ej_fact_sheet.pdf>.

7. Additional guidance should be considered on who is qualified to write about TCPs, with specific language stating that the views of the affected community are a line of evidence at least as reliable and important as that of CRM professionals and that the culturally-affiliated group should be given a role in the selection and education of documenters and be given the opportunity to become team participants in helping to write their own histories (Appendix II). This also would seem consistent with the recent ACHP Guidance on TCLs: <<http://www.achp.gov/natl-ga.pdf>>. We have seen Appendix II be incorrectly used by some to state that nontribal professionals are required to determine if a TCP exists, a task that is supposed to be left to the community itself. Also, it should be stated that nontribal professionals are not needed to identify TCPs and may not always be needed to make affirmative recommendations of eligibility or complete the National Register forms.

8. Guidance should also recognize that there are other less invasive means of surveying for particular components of some tribal TCPs, such as historic human remains detection dog teams, that can be more culturally-appropriate than excavation or other scientific techniques. For example, we have had good results using the Institute for Canine Forensics in ways that have validated the presence of ancestral human remains and allowed for their preservation in place. Other tools could involve geoarchaeology, etc. Such emerging, less invasive methods should be encouraged (Section IV.).

9. It should be made clear not to conflate the existence of a TCP with a National Register eligible property. A TCP can exist without a National Register form or eligibility determination being completed. Bulletin 38 is guidance for determining Register-eligible TCPs - not if a TCP exists.

10. It should be made even more clear that a TCP does not require the presence of physical archaeology and that intangible cultural resources can also contribute to TCPs as this still appears to be a source of confusion for some agencies and is often misrepresented by project applicants and their consultants (often archaeologists) to try and minimize the value of a place so as to destroy the place or infringe upon the tribal religious practices.

11. Reference should be made that tribes should be involved in developing historic contexts and research questions that are truly relevant to their communities and places.

12. More examples for meaningful evaluation that protects confidentiality, along the lines of the MX missile system approach, could be provided. However, caution should also be stated about not rushing to "assume" eligibility as we have seen this has often been used to override impacts to TCPs and shortcut consultation processes with tribes where avoidance, preservation and mitigation should be properly discussed and negotiated in an appropriate timeframe.

13. Discussion of Criterion (C)(4) should reference that the components may have individual distinction as well as a collective distinction. While this should be obvious, its absence from the Bulletin has caused some confusion, particularly in filling out the National Register forms.

14. Discussion of Criterion (D)(4) should reference that there are other avenues of information potential apart from archaeological excavation. This could include examining existing collections, completing study of historic ethnographic materials, etc.

15. NPS should build upon its online library for TCPs and TCLs to include Cultural Conservation (1983) in its entirety and in an easy to find PDF, as well as other relevant resources and helpful links.

Thank you for the opportunity to comment. We hope that NPS makes every effort to outreach to tribes, both federally and nonfederally recognized, so that their experiences regarding TCPs can directly inform your effort. Also, will NPS be producing a report, based on comments received, making recommendations about other action steps that might be appropriate for advancing the protection of TCPs and TCLs, such as legislation, reports, rulemaking, etc. Please keep us informed on the comment and review process.

Best regards,

Courtney Ann Coyle
Attorney at Law
Held-Palmer House
1609 Soledad Avenue
La Jolla, CA 92037-3817

"Protecting and Preserving Tribal, Cultural, Biological and Park Resource Landscapes"

ph: 858.454.8687
fx: 858.454.8493
e: CourtCoyle@aol.com